Local Union No. 200, General Service Employees' Union, S.E.I.U., AFL-CIO *and* Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility, Poughkeepsie, New York. Case 3-CG-12

August 16, 1982

DECISION AND ORDER

Upon an unfair labor practice charge filed on September 17, 1979, by Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility, Poughkeepsie, New York (herein also called Eden Park Management or the Employer), and duly served on Local Union No. 200, General Service Employees' Union, S.E.I.U., AFL-CIO (herein also called Local 200 or Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint on December 27, 1979, against Respondent alleging that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8(g) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Thereafter, Respondent filed a timely answer denying the commission of any unfair labor practices and asserting certain affirmative defenses.

On May 27, 1980, the parties jointly moved the Board to transfer the instant proceeding to the Board without the benefit of a hearing before an administrative law judge, and submitted therewith a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On August 15, 1980, the Associate Executive Secretary of the Board, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel filed a memorandum brief.

Upon the entire record in the case, the Board makes the following findings:

I. JURISDICTION

The Employer is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York. At all times material herein, the Employer has maintained its principal office and place of business at 22 Holland Avenue in the city of Albany and State of New York and various other facilities throughout the State of New York, including a facility located at 100 Franklin Street in the city of Poughkeepsie and State of New York (herein also called the Poughkeepsie facility), where it is, and has been at all times material herein, engaged in the operation of a health care institution supplying related care and services to nursing home patients. During the past year the Employer, in the course and conduct of its business operations, derived gross revenue from its operations in excess of $100,000, and purchased and received goods and services valued in excess of $10,000 directly from points located outside the State of New York. We therefore find that the Employer is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The issue presented is whether Respondent violated Section 8(g) of the Act[1] by engaging in a sympathy strike without first giving 10 days' notice to the Employer and the Federal Mediation and Conciliation Service (herein also called the FMCS) of its intention to do so.

A. *Facts*

The Employer operates a health care institution in Poughkeepsie, New York, with facilities for 192 geriatric residents. On January 25, 1979,[2] Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, S.E.I.U., AFL-CIO (herein also called Local 144), was certified in Case 3-RC-7268 as the exclusive representative for a unit of the service and maintenance employees at the Poughkeepsie facility. On September 11, having given appropriate notice under Section 8(g) of the Act, Local 144 commenced an economic strike against the Employer, with picketing on the public sidewalk and street outside the Poughkeepsie facility.

Local 200 traditionally represents employees of health care institutions located in and around the Poughkeepsie, New York, area, but represents no

[1] Sec. 8(g) provides:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[2] All dates herein are in 1979 unless otherwise indicated.

employees of the Employer at the Poughkeepsie facility.[3] On September 11 and other dates in September and October, Local 200 Vice President David Patrick and Local 200 business agents Millie Melendez and John Muir participated in the picketing at the Poughkeepsie facility. At no time did Local 200 give notice under Section 8(g) of the Act of its intent to picket the Poughkeepsie facility. The purpose of the picketing by agents of Local 200 was to lend support and assistance to, as well as to generate publicity for, the employees represented by Local 144. The picketing activities of Local 200 agents in support of Local 144 were publicized in the December edition of the "Local 144 News," a Local 144 publication, as follows:

> Local 200 President David Patrick, Representatives John Muir and Millie Melendez, along with 100 Dutchess County members of 144's sister union in the Service Employees International Union, turned out to walk with their fraternal brothers and sisters on the Eden Park strike line.

The Poughkeepsie Journal, a daily newspaper of general circulation, noted in a September 11 article Patrick's participation in the picketing on September 11, but did not indicate Patrick's affiliation with Local 200.[4]

B. *Contentions of the Parties*

Relying on *District 1199, National Union of Hospital & Healthcare Employees, RWDSU, AFL–CIO (First Healthcare Corporation, d/b/a Parkway Pavilion Healthcare)*,[5] the General Counsel contends that sympathy striking by a union against a health care institution comes within the purview of Section 8(g) of the Act and that Respondent's agents therefore acted unlawfully when they failed to give the requisite 8(g) notice before participating in Local 144's lawful economic strike at the Employer's Poughkeepsie facility.

Respondent did not file a brief with the Board. However, in its answer to the complaint Respondent asserted affirmatively that, because Local 200 is not the certified collective-bargaining representative of any employees at the Poughkeepsie facility, it has no bargaining status or rights under the Act and, therefore, was not obligated under Section 8(g) to notify the Employer of its intention to engage in picketing at said facility; and further that, since sympathy picketing constitutes an informal showing of support for another union, it is not the type of activity described in Section 8(g), and does not therefore require compliance with the 10-day notice provisions of that section.[6]

C. *Discussion of Law and Conclusions*

In *Parkway Pavilion Healthcare, supra*, the Board found, *inter alia*, that the legislative history and policy considerations which prompted the enactment of Section 8(g) mandate a finding that irrespective of its character, objectives, or the type of economic pressure it generates *any* strike, work stoppage, or picketing, including sympathy picketing, at a health care institution violates Section 8(g) if the 10-day notice requirements of that section have not been fulfilled. Applying this principle to the instant case, we find that by failing to notify separately the Employer and the FMCS of its intention to participate in strike activity at the Poughkeepsie facility, albeit in sympathy with Local 144's lawful economic strike, Respondent violated Section 8(g) of the Act.

We find no merit to Respondent's affirmative defenses that, due to the sympathy nature of its conduct or the fact that it represents no employees at the Poughkeepsie facility, it was relieved of any obligation to give the 8(g) notice. As the Board indicated in *Parkway Pavilion Healthcare, supra*, Section 8(g) makes it clear that compliance with the 10-day notice provisions by a labor organization is required in advance of "*any* strike, picketing, or other concerted refusal to work at *any* health care institution." (Emphasis supplied.) Because Section 8(g) was designed to provide every health care institution with sufficient time to make arrangements for continuing patient care during a labor dispute, compliance with the notice requirements is not negated by the fact that the participating labor organization does not enjoy representational status at the subject facility.[7] Nor does compliance by one

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[3] In fact, other than those employees represented by Local 144, no employees at the Poughkeepsie facility are represented by a labor organization.

[4] While Respondent asserted in its amended answer to the complaint that the individual actions of Patrick, Melendez, and Muir at the Poughkeepsie facility were not authorized or sanctioned by Local 200, it is clear from the stipulated facts that Respondent now acknowledges that the sympathy picketing at issue was by agents of Local 200. In any event, we note that the Board regularly considers individuals in positions similar to those held by Patrick, Melendez, and Muir to be agents of a union; that Respondent admitted in its amended answer to the complaint that, pursuant to the provisions of the constitution and bylaws of the International Union, Local 200 "through its agents and or employees" was acting in sympathy with the strike activity of Local 144; and that Respondent took no affirmative steps to indicate this sympathy activity was not sanctioned by Local 200. We therefore find the sympathy strike activity herein attributable to Local 200.

[5] 222 NLRB 212 (1976).

[6] Respondent also defended its conduct on the grounds that other labor organizations picketed in sympathy with Local 144 without first giving the allegedly proper notice under Sec. 8(g). We find that the legality of the conduct of any other labor organization is not before us, and further is irrelevant to the question of whether Respondent engaged in unlawful conduct.

[7] During Senate debates before passage of the health care amendments Senator Taft made it clear that Sec. 8(g) applies "not only to bargaining

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labor organization fulfill the statutory requirement for labor organizations which may later join the dispute. To find otherwise would be to ignore the potential for unexpected disruption in services resulting from the addition of a second labor organization to the picketing activity.[8]

In sum, we find that Respondent violated Section 8(g) of the Act by picketing at the Poughkeepsie facility without first giving the requisite 8(g) notice.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to industrial strife burdening and obstructing commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(g) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and on the entire record in this case, we make the following:

CONCLUSIONS OF LAW

1. Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility, Poughkeepsie, New York, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing at Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility, Poughkeepsie, New York, without first giving 10 days' written notice to Eden Park Management and to the Federal Mediation and Conciliation Service, Respondent has violated Section 8(g) of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local Union No. 200, General Service Employees' Union, S.E.I.U., AFL-CIO, Albany, New York, its officers, agents, and representatives, shall:

1. Cease and desist from engaging in any strike, picketing, or other concerted refusal to work at the premises of Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility without notifying in writing Eden Park Management and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Post at its business offices, meeting halls, and all other places where notices to its members are customarily posted copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 3 enough signed copies of the aforesaid notice for posting by Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility, Poughkeepsie, New York, if it is willing, in places where notices to employees are customarily posted.

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strikes or pickets, but also, as stated in the statute, to 'any picket or strike.' As examples, this subsection would apply to recognition strikes, area standard strikes, secondary strikes, jurisdictional strikes, and the like." 120 Cong. Rec. S6941 (1974). During these same debates Senator Javits, addresing the critical community need for continuity of health care and the procedures designed by Congress to avoid disruption of health care delivery, states that "10 days notice of any strike or picketing . . . must be given to a health care institution." 120 Cong. Rec. S6935 (1974).

[8] We are mindful of the fact that *Parkway Pavilion Healthcare* was dismissed from the bench by the Second Circuit Court of Appeals, which found that by joining the lawfully established picket line of another union for 1-1/2 hours the respondent union's four officers engaged in a *de minimis* violation of the Act. *N.L.R.B.* v. *District 1199, National Union of Hospital & Healthcare Employees, RWDSU, AFL-CIO*, 556 F.2d 558 (1976). We note, however, that here agents of Respondent, which traditionally represents employees of health care institutions, engaged in sympathy picketing at the Poughkeepsie facility at various times over a period of 2 months; said picketing was admittedly aimed at lending support and assistance to, as well as generating publicity for, the cause of employees represented by Local 144; and Respondent's participation was in fact cited in a Local 144 publication as evidence of the breadth of strike support.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBERS FANNING and ZIMMERMAN, dissenting:

Our colleagues today insist on mechanistically reading and applying the special notice requirements of Section 8(g) of the Act to find that the sporadic participating of three representatives of Local 200 in a lawful economic strike engaged in by Local 144, after the latter union gave appropriate notice, constitutes a violation of the Act. This is hardly the exercise of careful factual analysis or sound judgment that Congress has conferred on the Board. Moreover, this decision perpetuates the same error already found fatal by the Second Circuit Court of Appeals in a recent case discussed *infra*. Because we find no evidence that Local 200's actions in any way changed the character of the strike or the picketing activity, and because the majority's decision does nothing to further the legislative purpose underlying the special notice requirements of Section 8(g), we dissent.

It is now settled that all strike and picketing activity directed against a health care facility is subject to 10 days' advance notice to the employer and the Federal Mediation and Conciliation Service as required by Section 8(g).[10] The purpose of such notice was clearly set forth in the Senate Report which accompanied the 1974 health care amendments to the Act:

> It is in the public interest to insure the continuity of health care to the community and the care and well being of patients by providing for a statutory advance notice of any anticipated strike or picketing. For this reason, the Committee approved an amendment adding a new Section 8(g) which generally prohibits a labor organization from striking or picketing a health care[11] institution without first giving 10 days' notice.

That report went on to make clear that the notice period was designed to permit the health care institution involved an opportunity to make arrangements necessary for patient care to continue without interruption.

Nothing in the record before us suggests that the isolated and occasional participation by representatives of a Union that represented no employees of the Employer in any way altered the character of the strike, generated any new or expanded pressure on the Employer, or posed additional or expanded threats to the Employer's ability to provide for the care and well-being of its patients. Thus, none of the legislative objectives that provided the basis for enacting Section 8(g) will be served by finding a violation here.

Nonetheless, our colleagues in the majority insist on a literal interpretation of that section, and perpetuate the Board's rigid and mechanistic approach to the special notice requirements. In *District 1199, National Union of Hospital & Healthcare Employees, RWDSU, AFL-CIO (First Healthcare Corporation, d/b/a Parkway Pavilion Healthcare)*, 222 NLRB 212 (1976), the Board found that 1-1/2 hours of participation by four agents of District 1199 triggered the 8(g) notice requirements of the Act. Member Fanning and former Chairman Murphy dissented from that determination, and we reaffirm and adopt the views expressed in their dissent. That decision, which stands as the unfortunate predicate for the determination the majority reaches today, was denied enforcement by the Second Circuit Court of Appeals on the grounds that the violation, if any, was *de minimis*.[12] Whether characterized as *de minimis*, or as not within the scope of the notice requirements, we think the same fundamental principles govern. Some underlying legislative purpose must be served to justify imposition of the notice requirements. Here, our colleagues can point to none.

We agree that if the notice of the primary striking union had been defective, or if the participation by Local 200 in the picketing had somehow broadened the dispute or the effect of the picketing, a violation by Respondent would be made out. In that sense, it may be said that Respondent's representatives participated in the picketing at their peril. But since no such consequences occurred, we would not squander the Board's limited resources by applying the notice requirements merely to insure against the possibility that they might have.

The right to strike is one of the core protections guaranteed by the National Labor Relations Act. The right to engage in peaceful picketing is guaranteed not only by the Act, but by the United States Constitution. We recognize, of course, that these rights are subject to restriction where some legitimate governmental objective is to be protected. Here we fail to see any such objective, and the majority fails to identify one. It is clear that Congress, in imposing the restrictions of Section 8(g), was concerned not with the acts of striking or picketing *per se*, but with the effects of such activity. We would interpret that section in accord with those objectives.

[10] *Painters Local No. 452 (Henry C. Beck Company)*, 246 NLRB 970 (1979).

[11] 93d Cong., 2d Sess. 5 (1974).

[12] 556 F.2d 558 (1976).

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT engage in any strike, picketing, or other concerted refusal to work at the premises of Eden Park Management, Inc. d/b/a Eden Park Nursing Home and Health Related Facility, Poughkeepsie, New York, or any other health care institution, without notifying in writing Eden Park Management, or such other health care institution, and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

LOCAL UNION NO. 200, GENERAL SERVICE EMPLOYEES' UNION, S.E.I.U., AFL-CIO